Dock. 95-42

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
REQUEST BY A.C. NIELSEN COMPANY	)	
FOR THE COMMISSION'S AUTHORIZATION	)	
FOR TELEVISION BROADCAST STATIONS	)	**DA 89-1060**
TO TRANSMIT ENCODED INFORMATION ON	)	
LINE 22 OF THE ACTIVE PORTION OF	)	
THE TELEVISION VIDEO SIGNAL	)	
	)	
To: The Commission	)	

PRELIMINARY OPPOSITION OF A.C. NIELSEN COMPANY TO MOTION OF AIRTRAX FOR STAY

A.C. Nielsen Company ("Nielsen"), through counsel, hereby preliminarily opposes the Motion for Stay filed December 20, 1989, by Airtrax.[1] Although Nielsen has, with Airtrax's consent, sought an extension of the time within which it must file its Opposition

---

[1] Pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d) (1989), Nielsen's Opposition would be due for filing today; however, on December 22, 1989, when Nielsen first learned that Airtrax had filed its Motion for Stay and accompanying Application for Review, Nielsen filed a Consent Motion for Extension of Time, after obtaining the consent of Airtrax's counsel to such an extension. On December 26, 1989, Nielsen's counsel contacted by telephone the offices of each Commissioner, the Chairman, and the Chief of the Mass Media Bureau, to notify such officials of Nielsen's filing of the Consent Motion, as required by Section 1.46(c) of the Commission's Rules, 47 C.F.R. § 1.46(c) (1989). As of this writing, the Commission has not, to Nielsen's knowledge, acted upon the Consent Motion for Extension of Time. Subsequent to counsel's contacting the Commission officials identified above, counsel learned that Airtrax's primary counsel did not approve of the extension granted by another attorney in the firm representing Airtrax herein. Counsel for Nielsen agreed to alternative dates on which Nielsen would be required to file its Oppositions to Airtrax's Motion for Stay (January 17, 1990) and Application for Review (January 19, 1990). Counsel understands that Airtrax will file a pleading with the Commission explaining its change in position with respect to Nielsen's request for an extension.

to Airtrax's Motion for Stay,[2] the Commission has not, to Nielsen's knowledge, acted upon Nielsen's request; therefore, Nielsen is filing the instant Opposition in the event the Commission denies its request for an extension of time. If the Commission grants Nielsen's request for an extension, Nielsen will supplement the instant Opposition with a more detailed brief. In support of its Opposition to Airtrax's Motion for Stay, Nielsen states the following:

FACTUAL BACKGROUND

1. On November 22, 1989, the Chief, Mass Media Bureau, granted Nielsen's request for Special Temporary Authority allowing Nielsen to encode program identification codes on Line 22 of the active portion of the video signal, and allowing television stations to transmit Nielsen's program identification codes in conjunction with the encoded programming.

2. Because Airtrax also encodes programming on Line 22 of the active video signal, the Chief placed certain restrictions on Nielsen's temporary grant of authority to prevent overwriting of Airtrax codes by Nielsen. The most siginificant of these restrictions for purposes of Airtrax's Motion for Stay are the requirements that Nielsen only encode those portions of videotapes that Nielsen seeks to track, and that Nielsen's codes not adversely affect the codes placed on Line 22 by Airtrax or others. See Airtrax Motion for Stay at 2. Moreover, the Chief admonished

---

[2] See supra note 1.

Nielsen that "this temporary authorization may be withdrawn summarily at the Commission's discretion if the Commission has reason to believe that other systems are being adversely affected." Letter from Roy J. Stewart to Grier C. Raclin (November 22, 1989) at 5; see Airtrax Motion for Stay at 6.

ARGUMENT

3. Airtrax has failed to satisfy even one of the four parts of the standard for obtaining a stay, as enunciated in Virginia Petroleum Jobbers Ass'n. v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958) ("Virginia Petroleum Jobbers") and its progeny. Furthermore, Airtrax's Motion is based not on sworn factual assertions, but on hyperbolic speculation, unsworn hearsay, and liberal extrapolations therefrom. Thus, Airtrax's Motion should be denied.

4. As Airtrax correctly has observed, it must meet a four-part test to obtain a stay of the Special Temporary Authority ("STA") granted to Nielsen. Under Virginia Petroleum Jobbers, which has been adopted by the Commission, WATS Related and Other Amendments of Part 69 of the Commission's Rules, 2 F.C.C. Rcd. 245 (1987); GTE Telenet Communications Corp., 57 R.R.2d 1367 (1985), to obtain a stay of the STA, Airtrax must show:

1. that it is likely to prevail on the merits;
2. that, without the relief it seeks, it will be irreparably injured;
3. that the issuance of the stay would not substantially harm Nielsen or other parties interested in the proceeding; and
4. that the stay is in the public interest.

GTE Telenet, 57 R.R.2d at 1384.

5. Although each of the four elements of the test must be satisfied, if Airtrax has satisfied the second, third, and fourth elements, the Commission in its discretion may grant a stay even if Airtrax fails to demonstrate that it will likely prevail on the merits, provided that it has at least made a "substantial case on the merits." Id. (citing Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977)). The propopent of a stay carries a heavy burden, Audio Recordings, 57 F.C.C.2d 1177, 1178 (1976), and Airtrax has failed to meet its burden. Because it has failed to satisfy one, let alone all, of the elements of the Virginia Petroleum Jobbers test, Airtrax's Motion for Stay should be denied.

6. Airtrax has failed to make a substantial case on the merits, much less demonstrated that it is likely to prevail. Airtrax argues that the Commission's restrictions on Nielsen's grant of authority -- and the corresponding sanction of withdrawal of that authority -- are insufficient to protect Airtrax's interests, and that only a wholesale stay of the grant of authority to Nielsen will adequately protect Airtrax. In support of its argument, Airtrax makes several assumptions, which it posits as established facts.

7. First, Airtrax argues that Nielsen can not exercise its authority to encode signals on Line 22 without overwriting Airtrax's (or another party's) codes and thereby violating the

restrictions placed on Nielsen's STA. Airtrax Motion for Stay at 6-8. This argument assumes incorrectly that it is technologically impossible for Nielsen to place codes on Line 22 without disturbing the codes of others placed previously on Line 22.[3] Airtrax's argument also ignores the fact that the Commission will withdraw the authority granted to Nielsen if it finds that Nielsen has overwritten the Line 22 codes of Airtrax or others, and the commonsense notion that Nielsen will take all necessary steps to ensure that codes are not overwritten and authority is not withdrawn. Surely, the Commission would not have granted Nielsen the authority to do that which is impossible to do, as Airtrax suggests! Nevertheless, based only on its bald assertions, Airtrax claims that it has made a substantial case on the merits. Obviously, this is not true.

7. Second, Airtrax boldly argues that even if Nielsen overwrites Airtrax codes only in a few instances, Airtrax's business will be destroyed, and Airtrax will be irreparably harmed. Airtrax Motion for Stay at 3-4, 6. This untenable argument is merely speculative hyperbole and is unsupported by anything other than Airtrax's own gloomy predictions. As the United States Court of Appeals stated in construing the "irreparable harm" element of the Virginia Petroleum Jobbers test, "the injury [alleged] must be

---

[3] Airtrax supports its argument only with two letters, neither of which even suggests, much less states, that it will be impossible for Nielsen to place its codes on Line 22 without disturbing other codes previously placed on Line 22. Such flimsy evidentiary support is inadequate for the relief Airtrax seeks.

both certain and great; it must be actual and not theoretical." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). While there is little question that being driven out of business constitutes "irreparable harm," Airtrax's mere prediction that it will be driven out of business if even a few of its codes is overwritten is insufficient to establish the imminence of the harm Airtrax alleges.

8. Airtrax makes the incredible argument that Nielsen will not be harmed by a stay, since it will be impossible for Nielsen to implement its authorization without violating the conditions placed on the STA. As demonstrated supra, Airtrax's underlying argument is unsupported; consequently, its argument that Nielsen will not be harmed by a stay is spurious. Furthermore, Airtrax does not even consider -- let alone discuss -- the harm that will befall others besides Nielsen if a stay is granted. Thus, Airtrax has failed to satisfy the third element of the Virginia Petroleum Jobbers test.

9. Finally, Airtrax's argument that the public interest will be served by a stay of the authority granted to Nielsen is incorrect. Airtrax asserts that, because Nielsen allegedly can not implement its authorization without violating the restrictions placed on such authorization, and because Airtrax will "be extinguished" if Nielsen exercises its authority, the public interest will be served by a stay. Airtrax Motion for Stay at 9. Because both of the premises upon which this circular argument is based are faulty, the public interest argument itself also is

flawed.

10. Moreover, the "public interest" alleged by Airtrax is in essence nothing more than its own interest. As the Commission has stated, however,

> the major purpose of a stay is 'to avoid irreparable injury to the public interest sought to be vindicated on appeal' [and] even a showing of substantial private harm is not sufficient where the public interest would be impaired by a grant of the stay.

The Western Union Telegraph Company, 53 F.C.C.2d 144, 147 (1975) (quoting) Scripps-Howard Radio, Inc. v. F.C.C., 316 U.S. 4, 14 (1942), and citing Yakus v. United States, 321 U.S. 414, 440 (1944)). Airtrax can not and has not demonstrated that a stay of the authority granted to Nielsen would be in the public interest, though it clearly would be in Airtrax's interest.[4] Indeed, the Chief of the Mass Media Bureau already has determined that the converse is true; i.e., that the STA is in the public interest. See Letter from Roy J. Stewart to Grier C. Raclin (November 22, 1989). Airtrax's Motion for Stay should be denied.

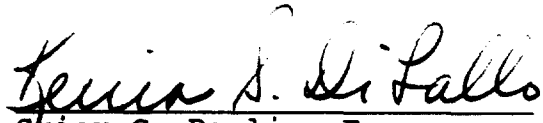
For the foregoing reasons, A.C. Nielsen respectfully requests

---

[4] It is apparent that Airtrax's Motion is calculated to prevent the competition from Nielsen that it fears if Nielsen is permitted to place its codes on Line 22. Where, as here, the harm alleged by the proponent of a stay is speculative and unsupported, or "based on nothing more than . . . fear of additional competition," the request for stay will be denied. GTE Telenet, supra, 57 R.R. 2d at 1385.

the Commission to deny the Motion for Stay filed December 20, 1989 by Airtrax.

Respectfully submitted,



Grier C. Raclin, Esq.
Kevin S. DiLallo, Esq.

HERON, BURCHETTE, RUCKERT
& ROTHWELL
1025 Thomas Jefferson St., NW
Suite 700
Washington, D.C. 20007
(202) 337-7700

Attorneys for
A.C. NIELSEN COMPANY

Dated: December 27, 1989

CERTIFICATE OF SERVICE

I, Arlene F. Lacki, a secretary in the law firm of Heron, Burchette, Ruckert & Rothwell, do hereby certify that a true and correct copy of the foregoing "Opposition to Motion for Stay" was sent on this 27nd day of December, 1989, by first-class mail, postage prepaid, to the following:

The Honorable Alfred C. Sikes*
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

The Honorable James H. Quello*
Member
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

The Honorable Sherrie P. Marshall*
Member
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

The Honorable Andrew C. Barrett*
Member
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Roy J. Stewart, Esquire*
Chief
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, D.C. 20554

John G. Johnson, Jr., Esquire
Bryan, Cave, McPheeters & McRoberts
1015 - 15th Street, N.W., Suite 1000
Washington, D.C. 20005-2689

Arlene F. Lacki

---

* Delivered by hand.